Supreme Court, U.S.
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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICUS* INTEREST

The National Congress of American Indians ("NCAI") writes to urge the Court to affirm the decision below and to explain why this case matters not just to the Navajo Nation but to her sister Tribes as well. At stake is a principle that is as time-honored as it is widely applicable: When an entity exercises such control over property as to take on trust responsibilities with respect to it, may the beneficiary of that trust relationship obtain monetary relief to remedy a fiduciary breach? To the end of reaffirming that the answer to that question is "yes," NCAI respectfully offers this brief *amicus curiae* for the Court's consideration.*

Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaska Native villages and Native American citizens. NCAI has long been, and continues to be, dedicated to protecting the rights and improving the welfare of American Indians.

Like the Navajo Nation, many NCAI members hold land that is subject to the Indian Mineral Leasing Act ("IMLA") and that is subject to the trust relationship that predates the Act and was reinforced by it. NCAI therefore has a fervent interest in ensuring that Tribes may rely on the Government to honor its fiduciary responsibilities when it supervises mineral leases on Indian lands under the Act. And it likewise has a keen interest in ensuring that Tribes may obtain satisfactory relief when the Government fails to honor those responsibilities.

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* Pursuant to Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part and no person other than *amicus* provided financial assistance in the preparation or submission of this brief. The parties have consented to the filing of this brief, and their consents have been filed with the clerk's office.

STATEMENT

As this case comes to the Court, there is little room for debate that the United States committed a serious breach of its trust duties to the Navajo Nation in the course of reviewing, approving, and supervising the mineral lease that is the subject of this case. Nonetheless, the United States maintains that the Navajo lack a cognizable claim. Success in this argument would necessarily result in summary judgment for the Government. Accordingly, in assessing whether a cause of action does in fact exist here, the Court must assume that a violation of the claimed duties has occurred and must view the underlying facts through the lens of the familiar summary judgment standard. That of course means the Navajo Nation receives the benefit of all favorable inferences. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 332, n.2 (1990).

Under these circumstances, the extensive factual claims made by the Government and its *amicus,* many of them without any proper foundation in the record, are beside the point and indeed serve only to muddy the waters. Properly viewed in the light most favorable to the Navajo, these are the relevant facts:

* In 1964 the Secretary of the Interior, ostensibly acting on behalf of the Navajo Nation, negotiated a lease for Navajo coal deposits with an affiliate of the Peabody Coal Company. The lease contained a low royalty rate of not more than 37.5 cents per ton, but reserved for the Secretary the authority to adjust the royalty rate to a reasonable level after 20 years. *See Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (2000).

* Beginning in 1979 the Tribe and Peabody unsuccessfully attempted to renegotiate the lease. The Tribe then asked the Secretary to exercise his reserved authority to adjust the rate. J.A. 139-41. In response, the Bureau of Indian

Affairs ("BIA") commissioned two studies: each supported an adjustment of the royalty to at least a 20% rate. In light of these studies, the Area Director adjusted the royalty rate to 20%. J.A. 141.

* Peabody appealed to the Commissioner of Indian Affairs who stayed the royalty adjustment pending appeal. The parties submitted briefs in early 1985, and the Tribe requested that the Department approve the 20% rate or terminate the lease due to violations of its provisions by Peabody. J.A. 142, 144.

* Relying on additional, more detailed studies supporting the 20% rate, the Commissioner finalized a decision document recommending approval of that rate. J.A. 151-54.

* After the pending decision was leaked to Peabody, the company hired Stanley Hulett, a close personal friend of Secretary Hodel, to seek the Secretary's assistance in the appeal. Shortly after an *ex parte* meeting with Mr. Hulett, the Secretary signed a memorandum prepared by Peabody instructing the Commissioner not to issue the decision approving the 20% rate. J.A. 157, 162-63.

* The Department sent the Tribe a letter in August, 1985, informing it that a decision had not been finalized in the appeal, but declining to explain why. Unaware of the meeting between Secretary Hodel and Hulett, or of the additional studies supporting the 20% rate, the Navajo assumed that the delay in approval was due to substantive concerns by the Department. In the face of a continuing loss of revenue caused by the still-controlling 1964 rate, the Navajo resumed negotiations with Peabody. J.A. 168-70.

* The Navajo eventually reached an agreement with Peabody that contained significant concessions. Among them were the following: a royalty rate of 12.5%, loss of the right to seek $89 million in back royalties and taxes, confirmation of existing tax waivers, and loss of the Secretarial review provision. J.A. 178-79.

* The Secretary approved the renegotiated lease despite numerous deficiencies in the review process. For example: A traditional economic analysis was not performed, J.A. 170, 175-76; the review found that the lease violated at least three regulations, J.A. 174; and the technical review was based on incomplete information and incorrect assumptions, J.A. 176-79.

Not surprisingly, both courts below concluded that the Government's conduct during this sequence of events fell far short of satisfying even the most basic standards of fiduciary care. As the Court of Federal Claims put it, "the Secretary . . . engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship," then "approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans." *Navajo Nation*, 46 Fed. Cl. at 226-27. These actions "violated the most fundamental fiduciary duties of care, loyalty and candor." *Id.* at 227. The Federal Circuit concurred, concluding that "[i]t can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest." *Navajo Nation v. United States*, 263 F.3d 1325, 1328 (Fed. Cir. 2001).

SUMMARY OF ARGUMENT

1. The Government rests its argument on a flawed foundation by claiming that the plain language of the Tucker and Indian Tucker Acts requires dismissal of this claim. By its terms, the Indian Tucker Act authorizes suits against the Government involving (1) "any claim," (2) "in favor of any tribe," (3) "whenever" the claim "aris[es] under the Constitution, laws, or treaties of the United States, or Executive orders." 28 U.S.C. § 1505. That broad authorization applies to any and all claims premised on federal positive law (and even common law), and readily extends to the present action, which finds its basis in statutes and regulations governing Indian mineral leasing, the Government's established trust responsibility toward Indians, and the Government's treaty obligations to the Navajo Nation.

History confirms that Congress intended the courts to honor the broad language of the Indian Tucker Act and specifically to apply it to breach-of-trust claims. The Act replaced an awkward and archaic system for bringing claims against the Government, one that forced Tribes to obtain authorization for suit through special jurisdictional acts on a claim-by-claim basis. As enacted, moreover, the Act cautioned that it should not be construed as altering "the fiduciary or other relations" between the United States and Indian Tribes, 60 Stat. 1049 (1946), and Congress determined that facilitating enforcement of the Government's trust responsibilities was an essential function of the Act. *See* H.R. Rep. No. 1466, at 5 (1945).

2. The Government fares no better under this Court's precedents, which light the path for this claim. In *United States v. Mitchell*, 463 U.S. 206, 218 (1983) ("*Mitchell II*"), the Court confirmed that the broad language of the Indian Tucker Act waives the United States' sovereign immunity and does so for breach-of-trust claims. The strict construction that

applies to claimed waivers of sovereign immunity therefore plays no role in this case. The Court need only fairly interpret the cited laws, statutes and regulations to determine whether they establish an actionable trust relationship. *See United States v. Testan*, 424 U.S. 392, 400 (1976).

3. The statutory and regulatory provisions that govern the mineral lease at issue satisfy the tests set forth in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *Mitchell II* for identifying the existence of a fiduciary relationship. First, the Indian mineral leasing framework itself "directly supports the existence of a fiduciary relationship," *Mitchell II*, 463 U.S. at 224, as the core purpose of that framework—evidenced by the statutes, regulations, and legislative history—is to protect Indian resources and to ensure Indians "the greatest return on their property," S. Rep. No. 985, at 2 (1937). Second, the Secretary's comprehensive authority over all aspects of mineral leasing amply demonstrates the kind of "control or supervision" that gives rise to trust duties under *Mitchell II*. 463 U.S. at 225.

Once it is established that the applicable statutes and regulations create a fiduciary relationship under IMLA, the general law of trusts informs the content of the attendant duties. The Government's contrary assertion that the statutes and regulations themselves must enumerate each and every fiduciary duty that applies has no foundation in precedent, to say nothing of common sense. In this case, moreover, there is no need to establish the outer boundaries of the Secretary's trust duties, as the conduct here—involving not just failure to act in the Navajo's interests, but affirmative action contrary to those interests—is inconsistent with even the most elementary fiduciary standards. A damages remedy under the Indian Tucker Act naturally follows from a breach of these trust duties—as *Mitchell II* itself establishes, 463 U.S. at 226, and as a wider body of Tucker Act precedent (*e.g.*, contract and takings claims) confirms.

4. The Navajo's claim is reinforced by nearly two centuries of precedent, which "establish[es] that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987). This underlying trust relationship lends context to and illuminates the *Mitchell II* "control or supervision" test. For when the Government controls or supervises Indian property, it operates at the core of this historical trust relationship, and this Court has appropriately recognized that the Government is required to carry out its responsibilities in a manner befitting a trustee.

ARGUMENT

It does not take a law degree to appreciate that a most fundamental breach of trust occurred in this case. It does not take much common sense to reach the same conclusion. And it cannot be doubted that most Americans—and certainly anyone who has ever negotiated a contract—would recoil at the sequence of events that occurred here.

What, then, is it about the law and a well-developed common sense that, in the eyes of the Federal Government, makes this case anything but an easy affirmance? According to the Government, the plain language of the Indian Tucker Act and this Court's precedents defeat the Navajo's claim as a matter of law. Yet that is not true. The most observant attention to the terms of the Indian Tucker Act and the most ardent respect for *stare decisis* fully support the Navajo's breach-of-trust claim. And the check of common sense does no less. The Court should affirm.

I. CONTRARY TO THE GOVERNMENT'S POSITION, THE PLAIN TERMS OF THE INDIAN TUCKER ACT DO NOT DEFEAT THIS CAUSE OF ACTION.

In arguing that the Navajo should be denied their day in court, the Government initially makes a series of plain-language arguments. It thus contends that the Tribe's claim "conflict[s] with . . . the terms of the Tucker Acts," (U.S. 20) and that a reversal "is compelled by the text of the Tucker Act." *Id.* 46. It then adds that "the court of appeals' reasoning contradicts the terms of the Tucker Act"(*id.* 17) and cannot "be squared with the explicit jurisdictional requirements of the Tucker Act." *Id.* 29. Through it all, the Government repeatedly invokes the language of the Tucker Act to point out that the Tribe's claim "must be squarely grounded on an 'Act of Congress' or 'regulation of an executive department.'" *Id.* 29, 46, 47 (quoting 28 U.S.C. § 1491(a)).

But this drumbeat of textual criticism not only fails under the language of the Tucker Act itself but, importantly, cannot be squared with the text and history of the statute most directly implicated by this case—the Indian Tucker Act. Indeed, conspicuously missing from the Government's brief is any meaningful discussion of the language and history of that Act. As it turns out, whether one considers the literal meaning of the terms of that Act or looks to the circumstances that prompted its passage, there is nothing in the Act that defeats this cause of action. The Government's efforts to dispose of this case on "plain language" grounds should be swiftly rejected.

According to the Indian Tucker Act:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. §1505.

One can scarcely imagine broader language. The statute extends to (1) "any claim" against the United States, (2) "in favor of any tribe," (3) "whenever" the claim "aris[es] under the Constitution, laws, or treaties of the United States, or Executive orders." 28 U.S.C. § 1505. The waiver of immunity thus applies to any and all claims premised on federal positive law, to say nothing of federal common law. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522-23 (1992) (construing federal statute preempting state "law" as applying to state common law); *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 99 (1972) (construing "laws" in 28 U.S.C. § 1331 to include federal common law). Not only does this language establish a broad grant of power to bring claims against the United States, but it also is markedly broader than the terms of the Tucker Act itself. The Indian Tucker Act specifically mentions claims under "treaties" and "Executive orders"; it specifically refers to "laws" rather than Acts of Congress; and on top of these specifics it sweeps in claims that "otherwise would be cognizable in the Court of Federal Claims" under the Tucker Act. *Cf.* 28 U.S.C. § 1491(a). Unless the additional language is mere sound and surplusage, the Indian Tucker Act surely extends even further than the Tucker Act—at least to the extent plain language, as the United States suggests (U.S. 17), is the proper guide.

The historical circumstances that prompted passage of the Indian Tucker Act confirm that Congress meant what it said and evidence its clear understanding that the Act would apply

to trust-obligation claims. In enacting the law, Congress legislated against the backdrop of a ruthlessly inefficient system for obtaining relief, one that historically had been viewed as excluding Tribes from proceeding under the Tucker Act and had thus forced Tribes to obtain special congressional authorization to gain relief from the Government. Inefficient though it was, this claim-by-claim method of authorization was frequently invoked by the Tribes to enforce the Government's trust obligations to them. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944).

In an effort to minimize these inefficiencies and to end the unfairness that flowed from this form of claim authorization, the Indian Tucker Act created a permanent vehicle for Tribes to enforce the Government's obligations—including trust obligations. As passed, the Act made clear that "[n]othing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian Tribes, bands or groups," 60 Stat. 1049 (1946), a provision omitted in a later codification as surplusage, *see* U.S. Code, Titles 18 and 28-Amendments, ch. 139, § 89(a), 63 Stat. 102 (1949). Clearly, then, while the Indian Tucker Act may have given the Tribes the "same rights and remedies" as non-Indians (U.S. 22), it did not limit them to those rights. Recognizing that trust duties without violation-of-trust remedies undermined the animating objectives of the trust relationship between the Tribes and the Nation, Congress determined that facilitating enforcement of the Government's trust responsibilities to Tribes was an essential function of the Act. *See* H.R. Rep. No. 1466, at 5 (1945) ("If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.")

In facilitating this transition from a retail to a wholesale system of claim authorization, the Indian Tucker Act brought to an end a regime in which permission to sue one branch of the Federal Government remained a claim-by-claim prerogative of another branch of the Government. At the same time, the Act ended a regime in which Tribes had few assurances that Congress would permit their claim, no matter how egregious the violation of federal law was. The Tribe's claim in this case stems from precisely the type of breach of trust that Congress intended to address—and permit—under the Act.

Notwithstanding all of this, the Government argues (U.S. 26) that there is a "fatal jurisdictional defect" in the Navajo's claim, namely that it does not arise from a cognizable source of law recognized by the Indian Tucker Act. Not so. The Navajo's claim arises from at least three "laws" and two "treaties" that literally fall within the Act's scope and that were breached in this instance: (1) the Indian Mining Leasing Act ("IMLA"); (2) the IMLA regulations; (3) the common-law Indian trust doctrine; and (4) the 1849 and 1868 Treaties between the United States and the Navajo. Whatever else the United States' position rests upon, it assuredly does *not* rest upon the plain language of the Indian Tucker Act.

II. PRECEDENT CONFIRMS THAT A CAUSE OF ACTION FOR BREACH OF TRUST EXISTS IN THIS CASE.

The United States fares no better in seeking refuge in this Court's precedents. As the bookend requirements of *Mitchell I* and *Mitchell II* establish, breach-of-trust claims like this one have indeed been authorized by Congress and by this Court under both the Tucker and Indian Tucker Acts.

A. Customary Principles Of Statutory Construction, Not Strict Construction, Determine Whether The Navajo Have A Cognizable Cause Of Action.

The *Mitchell* decisions set the initial terms of debate. And contrary to the Government's repeated suggestions (U.S. 16, 21, 24, 49), that debate does not center on, or even involve, the question whether a waiver of sovereign immunity has occurred with respect to tribal breach-of-trust claims.

Mitchell II gives force to what the terms of the Indian Tucker Act so plainly say. Namely, the Act waives the United States' sovereign immunity from applicable suits at law and related suits at equity, and does so with respect to breach-of-trust claims. *Mitchell II,* 463 U.S. at 219. That means the only question at issue in this case is whether a breach-of-trust action exists under the applicable law and whether a breach of trust in fact occurred. The strict construction that greets claimed waivers of sovereign immunity plays no role in this "analytically distinct" inquiry. *Id.* at 218. *Cf. Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional.").

Nor at any rate would it be appropriate to add this second impediment to a tribal claim. Having cleared the high hurdle for obtaining a waiver of immunity in the first instance, the Navajo were not required to clear yet another hurdle before they could have their day in court. No such double presumption against a cause of action exists. To the contrary: "'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'" *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quotation omitted). Once immunity has been waived, the Court has put Congress and the Executive Branch on notice that it will not act as "a self-

constituted guardian of the Treasury" and thereby "import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

More than just common sense and tradition support this truth; logic does so as well. If the Government were correct that the same degree of clarity must appear in the law that creates the cause of action as in the law that generally waives the Sovereign's immunity from suit, the general waiver would be superfluous. Why broadly waive a government's immunity from suit if the surrender only applies to statutes that otherwise contain an ample waiver?

Accordingly, in assessing whether a breach-of-trust action exists in this instance, the Court need only fairly interpret the cited laws, statutes and regulations. *See Testan*, 424 U.S. at 400. The Government is not entitled to an additional thumb on the scales. Indeed, if any presumptions exist at this stage in the case, they run in favor of the Navajo Nation, *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

B. The Government Has Extensive Trust Duties With Regard To Indian Mineral Leases.

A fair, even-handed reading of the applicable laws establishes that the Navajo's breach of trust claim is firmly grounded in the statutory and regulatory framework for mineral leasing on Indian lands. As this Court has recognized, these kinds of applicable laws may be relevant both to "establish a fiduciary relationship" and to "define the contours of the United States' fiduciary responsibilities." *Mitchell II,* 463 U.S. at 224. In other words, the statutes and regulations shed light both on the nature of the Government's substantive responsibilities and on whether the Government must act as a trustee in undertaking them.

A Tribe may demonstrate trust duties in at least two distinct ways: (1) by identifying statutes, regulations, or

treaties that "directly support the existence of a fiduciary relationship," *Mitchell II*, 463 U.S. at 224, or (2) by establishing that the Government exercises "control or supervision over tribal monies or properties," *Id.* at 225 (quoting *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). The Navajo have satisfied both criteria here.

First, as discussed in greater detail in the Navajo Nation's brief, there are numerous affirmative indications that both Congress and the Secretary have created and recognized trust duties in the mineral leasing context. The text of IMLA requires Secretarial approval of all leases, 25 U.S.C. § 396a, and directs the Secretary to reject a lease bid if it is "unwise in the interest of the Indians" to accept it, 25 U.S.C. § 396b. The history of the statute demonstrates that these provisions were intended "to give the Indians the greatest return on their property," and emphasizes Congress' intent that the Secretary would have increased control over whether to approve mineral leases. S. Rep. No. 985, at 2 (1937). The 1985 regulations stress that this control is exercised in the "interests of the Indians". 25 C.F.R. § 211.3 (1985). And the current regulations confirm that the Department's role is to "maximize[] [the] best economic interests" of the Indian Tribes. 25 C.F.R. § 211.1 (2002).

In respecting these manifestations of congressional intent, the Court has noted that the uniform leasing procedures created by the IMLA were "designed to protect the Indians," *Montana v. Blackfeet Tribe*, 471 U.S. 759, 763-64 (1985), and that the "basic purpose" of the Act is "to maximize tribal revenues from reservation lands," *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985). In short, the language, history, and purposes of the statutory and regulatory provisions all establish the Government's fiduciary role.

Second, the extensive control and supervision exercised by the Government over mineral leasing on Indians lands

establishes actionable trust duties as well. Even apart from direct statutory and regulatory manifestations of trust duty, the existence of a trust relationship "can be inferred from the nature of the transaction or activity." *Navajo Tribe v. United States*, 624 F.2d at 987. In particular, this Court has recognized that "'[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987). That is because when Congress authorizes the Government to exert supervision or control over Indian lands or property, it places the Government in a capacity that implicates both a central component of its unique relationship with the Indian people and a core role of private trustees. Thus "it cannot be said that the Congress [is] merely 'regulating' Indian affairs, as it does many other facets of our national life." *Mitchell v. United States*, 664 F.2d 265, 273 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983). Rather, if the relied-upon statutory or regulatory provisions set forth Government responsibilities in a context involving Government "control or supervision" of Indian money or property, *Mitchell II*, 463 U.S. at 224, it is presumed, absent contrary evidence, that Congress intended that the responsibilities set forth by statute be carried out in the role of trustee.

Mitchell I and *Mitchell II* applied these principles and illustrate how they should work here. In *Mitchell I*, the Court concluded that, by itself, the General Allotment Act failed to establish that the Government had a fiduciary duty with respect to timber management on allotted reservation land. This conclusion was reached on the basis of clear affirmative evidence that Congress specifically intended to limit the

Government's control and supervision of allotted land. Under the Act, "the Indian allottee, and not a representative of the United States, is responsible for using the land . . ." 445 U.S. at 542-43. Likewise, the legislative history "plainly indicate[d]" that the trust was of limited scope. *Id.* at 543. The drafting history pointed in the same direction: It made "plain" that the Government intended that the land be held in trust for the limited purposes of preventing alienation and of ensuring immunity from state taxation. *Id.* at 543-44.

In *Mitchell II*, by contrast, the Court held that "control or supervision" over timber management on allotted lands was demonstrated by other statutes. Having found "control or supervision," the Court concluded that the Government's role with regard to Indian timber demonstrated "all of the necessary elements of a common-law trust." 463 U.S. at 225.

Measured by the same "control or supervision" test, the Navajo's claim clearly passes. From start to finish, the Secretary exercises extensive control and supervision over mineral leasing on Indian lands. 25 U.S.C. §§ 396, 396a, 399. The Secretary decides whether Tribes may negotiate a lease and imposes strict constraints on the length of the negotiations. 25 C.F.R. § 211.2 (1985). The Secretary has the right to force bidding of a lease even where the Tribe has already completed negotiations. *Id.* And no negotiated lease is valid unless the Secretary has reviewed and approved it. 25 U.S.C. § 396a; 25 C.F.R. § 211.2 (1985). In point of fact, the Secretary's authority over leases exceeds that of the Indians themselves in many respects. *See, e.g.*, 25 C.F.R. § 211.27(a) (Secretary has authority to cancel or rescind a lease for breach without Tribe approval); *NRG Co. v. United States*, 24 Cl. Ct. 51, 56 (1991) (Secretary has authority to permit lease assignments and to cancel lease development permits without tribal consent).

Once the Government approves a lease, its control becomes even more complete. Among other things, the Government controls whether and when operations begin, 25 C.F.R. § 211.2 (1985), lease duration, 25 C.F.R. § 211.10 (1985), lease assignment, 25 C.F.R. § 211.26 (1985), lease fees and inspections, 25 C.F.R. §§ 211.18, 211.25 (1985), and suspension of lease operations and surrender of the leased property, 25 C.F.R. §§ 211.14a, 211.24 (1985). In the face of these regulatory truths, the Court has recognized that the IMLA is indeed "comprehensive legislation." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 763 (1985).

Nor does it change things that the Tribes as well as the Government have a role to play in the initial leasing decision. Under any sensible understanding of "control or supervision," it cannot be an all-or-nothing concept. *Cf. Mitchell II*, 463 U.S. at 223 (finding "control" over grants of right-of-way on Indian lands even while acknowledging that the Secretary's power to grant rights-of-way was conditioned on "the consent of the tribal or individual Indian landowner"). To find a lack of any Government fiduciary responsibility in this case simply because the Tribes are not utterly deprived of control would mean that any incremental gain in Tribal power would come at the cost of absolving the Government of its fiduciary duties with respect to the authority it retains. The law does not put Congress to such a choice.

Properly framed, the question is whether the Government exercises "control or supervision" over Indian land or property with respect to the conduct as to which a breach is claimed. Control or supervision over timber management was necessary in the *Mitchell* litigation because that was the subject of the claimed breach. In this instance, the conduct at issue is the Government's review and approval of a mineral lease. The Government's complete veto power over Indian mineral leases in itself qualifies as control or supervision over this process. The Government, accordingly, must be presumed to act in a

fiduciary capacity when it decides whether or not to approve a mineral lease. This, of course, does not mean that the Secretary invariably must "substitute her own judgment for that of the Indian mineral owner." U.S. 39. It does mean, however, that the approval decision should attend to Indian interests and be undertaken in a manner that respects and honors the Government's fiduciary duties.

C. The Government's Actions Here Violate Even The Most Minimal Fiduciary Standards.

Once it is established that the applicable statutes and regulations give rise to trust duties with regard to the Secretary's review and approval of mineral leases, the general law of trusts provides the appropriate framework for supplying content to those duties. Time and again, the Court has looked to private trust law in assessing the Government's duties to Indian Tribes. *See, e.g., Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 14 (2001); *United States v. Dann*, 470 U.S. 39, 48-49 (1985); *United States v. Mason*, 412 U.S. 391, 398 (1973). Indeed, the Court has suggested that the Government's obligations toward the Tribes are, if anything, even more stringent than the duties of private trustees. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the Government is subject to the "most exacting fiduciary standards").

In spite of these precedents and the common-sense principles that inform them, the Government argues (U.S. 28) that it does not suffice simply to demonstrate the existence of a trust relationship. Rather, it adds (*id.*), the applicable statutes and regulations must enumerate each and every fiduciary duty that applies to the Government. Besides being unsupported by precedent, this innovation would impose an enormous drafting burden on Congress, to say nothing of uncommon foresight. In this instance, for example, it is doubtful that it would have occurred to even the most

experienced legislators that they should itemize the Secretary's duty not to pull the rug out from under the Tribe's effort to obtain a favorable rate. Neither is the Government's position consistent with normal principles of statutory construction, which presume that Congress legislates against the backdrop of common law and intends statutes to be read in light of it. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (Congress acts in light of accumulated meaning when establishing a trust); *Navajo Tribe,* 624 F.2d at 988 (court is not "required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute"); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (deeming Government's position that statute "must spell out specifically all the trust duties of the Government" "certainly unnecessary for Indian property with its long and established history").

In this case, the Government's conduct failed to satisfy the most elementary fiduciary duties. First, notwithstanding the fact that the 20% royalty rate was supported by all of the Government's studies, Secretary Hodel placed a hold on the decision affirming that rate in direct response to lobbying by a close personal friend hired as Peabody's representative. The Department then stonewalled the Tribe in the face of repeated requests for information on the status of the appeal and the reasons for delaying a decision. Faced with a continuing loss of income due to the delay, and understandably interpreting the delay as related to substantive concerns with the rate, the Tribe returned to the bargaining table. The Tribe re-entered these "negotiations" at a marked disadvantage, since Peabody (but not the Tribe) knew that the Secretary had placed the appeal on indefinite hold at Peabody's request. The Secretary then approved the lease reached by these imbalanced negotiations a lease that ultimately contained significant concessions to Peabody, not least of which was the new rate. Moreover, the Secretary approved the lease without the

normal economic analysis and on the basis of an incomplete review.

As both the Court of Federal Claims and the Federal Circuit recognized, *Navajo Nation*, 263 F.3d at 1332 (quoting 46 Fed. Cl. at 227), this kind of conduct does not comport with basic fiduciary requirements of loyalty, care, and candor. *See, e.g.*, Restatement (Second) of Trusts §§ 170, 173, 174. By any standard, a trustee has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." Restatement (Second) of Trusts § 173 cmt. d. As the Court of Federal Claims noted, "[t]here is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." *Navajo Nation*, 46 Fed. Cl. at 226.

Under these circumstances, this case does not even require the Court to articulate the precise nature and scope of the fiduciary standards applicable to the Government's review and approval of the Navajo lease. For the Government's conduct violated bedrock fiduciary duties, no matter how narrowly or broadly defined. The Government did not merely fail to act loyally in serving the Indians' interests; it affirmatively undermined them. The Government did not merely fail to maintain candor with the Navajo; it affirmatively misled them. The Government did not merely approve a lease with economically unfair terms; it did so without engaging in its normal review process and with knowledge that the Navajo had negotiated the lease based on incomplete information. If the Government's control over Indian mineral leasing is subject to any fiduciary standard whatever—even a mere duty

of impartiality—this conduct falls considerably, and disappointingly, short of meeting it.

D. A Damages Remedy Is Available For Breach Of Trust Claims.

Once the Navajo establish a breach of trust by the Government, a damages remedy under the Indian Tucker Act invariably follows. "Given the existence of a trust relationship," *Mitchell II* makes clear, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." 463 U.S. at 226. The Government's repeated suggestion that some reference to money damages must appear in the applicable statutes, (U.S. 26, 29, 31), simply contradicts *Mitchell II*.

Nor is *Mitchell II* alone in this respect. Not only does the decision rest upon a long-established tradition of requiring trustees to pay money damages for fiduciary breaches, *see, e.g.*, Restatement (Second) of Trusts §§ 205-212 (1959); 3 Scott on Trusts § 205 (4th ed. 1988), and an equivalent practice under earlier Indian jurisdictional statutes, *see supra* at 9-10, it also builds upon a wider body of precedent. Outside the tribal context, Tucker Act decisions have not required an express provision for money damages in order to find that such damages were available. Rather, the substantive source of law may grant the claimant a right to recover damages either "expressly or by implication." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (quoted in *Mitchell II*, 463 U.S. at 217 n.16). The relevant analysis asks whether the source of substantive law relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage[s] sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976) (quotation omitted). In undertaking this assessment, proper consideration is given to "the text of the section . . . its context, legislative

background, [and] past-enactment history." *Eastport*, 372 F.2d at 1011.

That an express statutory authorization of damages claims is not required is illustrated by three of the most well-established aspects of Tucker Act jurisdiction: contract claims, takings claims, and claims for refund of money improperly exacted. The Court for example has never held that a contract with the Government must explicitly authorize monetary relief in order to obtain the normal remedies for breach. *See United States v. Winstar Corp.*, 518 U.S. 839, 885-86 (1996) (Souter, J. concurring) ("most Government contractors would be quite surprised by the dissent's conclusion that, where they have failed to require an express provision that damages will be available for breach, that remedy must be 'implied in law' and therefore unavailable under the Tucker Act"). And although the Fifth Amendment does not provide an express cause of action for damages caused by a taking, this Court has long recognized that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine." *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 12 (1990) (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946)).

Similarly, even absent an express provision for them, actions for reimbursement of money improperly exacted under a statute likewise are "founded upon an act of Congress." *See, e.g., Clapp v. United States*, 117 F. Supp. 576 (1954) (explaining basis for such claims); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (noting that the denial of such an action would "rest[] on the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye"). These cases properly recognize that to require the statute itself to provide for damages "would allow recovery only in cases where laws

other than the Tucker Act already created a right of recovery." *Clapp*, at 580 (quotation omitted).

In the end, history, practice and general principles of trust law confirm what *Mitchell II* makes clear. "[T]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.

E. The Government's Foundational Trust Responsibility To Indian Tribes Reinforces The Navajo's Claims.

Each of these conclusions is reinforced by "the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. Just as that relationship informed and supported the Tribe's claims in *Mitchell II*, so it does here.

For nearly two centuries, it has been "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *see also, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856). This predominant feature of the relationship between the Federal Government and the Indian Tribes stems from the most basic of sovereign acts—a realpolitik decision by the Tribes to cede title to their territory through treaties to the Federal Government in return for protection of that territory and the Tribes by the Government. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). The 1849 Treaty between the Navajo and the United States illustrates this. In return for the sovereignty-infringing promise to be "placed under the exclusive jurisdiction and protection of" the Federal Government, the Navajo were assured that they could "[r]ely[] confidently on the justice and

liberality" of the Government. 1849 Treaty, 9 Stat. 974, §§ I, IX; *see also*, 1868 Treaty, 15 Stat. 667.

In keeping with these foundations, the trust relationship, while serving as a source of federal authority, has at the same time placed a critical limit on that authority. *See, e.g., United States v. Sioux Nation*, 448 U.S. at 421 (trust relationship allows federal action with regard to Indian land without takings analysis but only if action geared to "protecting and advancing the tribe"); *Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943) ("the United States assumed the duty of furnishing [] protection, and with it the authority. . ."). In fact, the Court has described the trust relationship as requiring governmental compliance with the "most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

This trust responsibility serves numerous objectives. First, it sets an overarching check on congressional action in the field of Indian affairs. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977) (legislation must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"). Second, it informs federal legislation that is enacted, providing a background principle that guides the interpretation of federal statutes that do, or may, impact tribes. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). Finally, it establishes general duties of the Federal Government with respect to tribal land separate and apart from the express provisions of a treaty, statute, executive order or regulation. *See, e.g., Lane v. Pueblo of Santa Rosa* 249 U.S. 110, 113 (1919) (using trust relationship as basis to enjoin the

Secretary's proposed disposal of tribal lands despite lack of claimed violation of any treaty or statute).

Properly understood, then, the federal trust relationship underpins all actions of the Federal Government relating to Indian interests. It works as both a promise by the Federal Government about its conduct toward Indians and as a measure of that conduct. In the last analysis, the trust relationship ensures that the Government's actions toward Indians correspond to the "overriding duty of our Federal Government to deal fairly with Indians wherever located," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

In this case, the trust relationship illuminates and lends context to *Mitchell II*'s "control or supervision" test. When the Government controls or supervises Indian land or property, it of course is acting in a capacity that is at the heart of its historical trust relationship with the Indians and that parallels roles frequently served by private trustees. It thus is particularly appropriate to presume that Congress intends the Government to carry out its statutory responsibilities in a manner befitting the underlying trust relationship.

III. THE GOVERNMENT'S REMAINING ARGUMENTS ARE UNPERSUASIVE.

A. The Court's Private Right Of Action Cases Shed Little Light On The Proper Indian Tucker Act Inquiry.

The Government suggests (U.S. 24) that the Court's decisions concerning implied private rights of action inform the inquiry here. That is mistaken. Those cases and the concerns that underlie them have little bearing on this action.

As an initial matter, the Court has never looked to its private right of action cases to determine whether a cause of action exists in this setting. *Cf. Timpangos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002) ("[T]he legion of cases

in which tribes have sued to enforce Indian rights . . . have proceeded without undertaking [the private right of action] analysis."). In view of the unique context of the Tucker Act and Indian Tucker Act, the Court has properly tailored the inquiry to this setting—which is to say, it has asked whether the statute at issue "'can fairly be interpreted as mandating compensation . . . .'" *Testan*, 424 U.S. at 400 (quoting *Eastport*, 372 F.2d at 1008-09).

No less importantly, Tucker Act and Indian Tucker Act cases involve a federal statute specifically authorizing suits to enforce the obligations of the Federal Government itself. As such, they do not implicate many of the concerns that animate the Court's private right of action decisions. Federalism concerns, for example, are one of the guideposts in the private right of action analysis because those cases generally involve suits against state officials and because the Court presumes that Congress would not casually disrupt the constitutional balance between the States and the Federal Government. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). That concern does not apply here, however. Unlike parties seeking to collect money from a State (or state official) under a statute enacted by the Federal Government, Indian Tucker Act plaintiffs seek to enforce obligations against the Federal Government that the Federal Government itself has created.

For like reasons, *Bivens*-action cases do not offer a useful parallel. While they involve suits against federal rather than state actors, they deal with the unusual situation in which the Court acts in a common-law-type capacity to infer full tort remedies against federal actors despite the complete absence of affirmative action by Congress either authorizing such suits or defining the scope of liability. The Court, as a result, has hesitated to extend *Bivens* remedies to new contexts in view of the significant separation-of-powers concerns implicated by

such claims. *See, e.g., Correctional Services Corp. v Malesko*, 122 S. Ct. 515, 521 (2001). Indeed, because *Bivens* actions are grounded in the Constitution, and because Congress may not respond by amendment as it may where the claim derives from a statute, those separation-of-powers concerns are particularly acute. *See id.*, 122 S. Ct. at 524 (Scalia, J. concurring). No such problem arises with Tucker Act and Indian Tucker Act cases. They stem from a specific jurisdictional statute and arise out of obligations assumed by Congress.

In addition to these fundamental differences between Indian Tucker Act cases and private right of action cases, the nature of claims to enforce the Federal Government's obligations to Indians also make the analogy inapt. The inquiry in cases claiming a private right of action under a specific statute begins with consideration of whether the statute focuses on "a class of beneficiaries." *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2276 (2002). But in Indian Tucker Act cases pertaining to the Government's obligations regarding Indian lands and property, it is clear from the very nature of the relationship that Indians are the benefitted class.

Similarly, a core concern in the private right of action cases is whether Congress intended the rights at issue to be enforceable by the individuals they benefit or whether it intended enforcement by some other means. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 289 (2001); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 28. This same concern is important in *Bivens* cases as well, and is often critical to the decision whether to extend *Bivens* to a new context. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 489 (1988). In Indian Tucker Act cases, however, there is no concern that Congress may have intended enforcement by some other mechanism. In fact, the Indian Tucker Act was specifically passed to provide a means for ensuring accountability with respect to the Government's obligations to

the Tribes. *See* H.R. Rep. No. 1466, at 5 (1945) (the lack of redressability for most Indian claims "encourages bureaucratic disregard of the rights of Indian citizens . . . ."); 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson) ("let us see that the Indians have their fair day in court so that they can call various government agencies to account on the obligations that the Federal Government assumed.").

Further, the question whether a breach of trust action exists in the Indian Tucker Act context is inextricably linked to the historical trust relationship between Indians and the Federal Government and turns on whether the statute gives rise to trust duties in light of that relationship. These considerations, it is clear, play no role in private right of action cases.

In light of these differences between the two types of cases, the Court has not drawn a parallel between them—and notably did not do so in *Mitchell II* when the Federal Government relied on private right of action decisions to advance its position there. *See* Brief for United States at 21-22 No. 81-1748 (Sept. 3, 1982). Rather, the Court based its analysis on traditional Tucker-Act principles and the trust relationship between the Tribes and the United States. *Mitchell II*, 463 U.S. at 218, 225. The Government's continued reliance on the private right of action cases here is simply incompatible with *Mitchell II*.

B. The Government Cannot Avoid Damages Liability By Relegating The Tribe To APA Relief Or By Focusing on the Appeal Regulations.

The Government next argues (U.S. 37) that the Navajo should be limited to seeking declaratory or injunctive relief under the Administrative Procedure Act ("APA"). Such relief, however, is clearly insufficient to remedy the damages caused by the Secretary's violations in this case. As this Court recognized in *Mitchell II*, "prospective equitable remedies are

totally inadequate" to cure violations of the Department's duties in overseeing Indian lands. 463 U.S. at 227. "[B]y the time government mismanagement becomes apparent," the Court noted, "the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." *Id.* That concern is all the more true when the Government acts in a deliberately secretive way, as it did here, making the possibility of meaningful injunctive relief all but impossible.

Nor does it change matters that much of the Secretary's egregious conduct took place during the pendency of Peabody's appeal from the Department's decision to impose the 20% royalty rate. The Government suggests (U.S. 37) that no relief is available under the Tucker Act for that conduct because the regulations governing the appeal process do not mandate compensation for their breach. This narrow-minded conception of the Secretary's role is unsupported by the appeal regulations, and it fails to recognize the direct connection between the Secretary's actions in the appeal process and his later review and approval of the renegotiated lease.

As an initial matter, it is evident from the regulations governing appeals that, contrary to the Government's suggestions, the Department is required to protect Indian interests during that process. For example, these regulations require the Department to render assistance to Indians in the appeal process if requested, 25 C.F.R. § 2.10 (1985), to notify Indians of their right to appeal a decision, 25 C.F.R. § 2.4 (1985), and to require the posting of a bond to protect the interests of any Indians affected by an appeal, 25 C.F.R. § 2.3(b) (1985). At the same time, an appeal is available only to "correct" a decision by the Department where it conflicts with rights established by the Constitution, other federal laws or Departmental regulations. 25 C.F.R. § 2.2 (1985).

Thus, during the appeal, the Department does not assume the role of neutral arbiter. Indeed, it would make little sense

for the Department to make decisions in its fiduciary capacity concerning Tribal resources, then purport to review those decisions from a neutral perspective on appeal. Instead, the appeal is appropriately limited to determining whether a given decision directly violates some other law or regulation. These review responsibilities are consistent with, and in no way eliminate, the Government's duties toward the Tribe. *Cf. Nevada v. United States*, 463 U.S. 110, 128, 144 n.16 (1983); *id.* at 145 (Brennan, J., concurring).

Further, although these regulations clearly indicate that the Department acts in its fiduciary capacity when conducting an appeal, the Navajo's claim in this case looks far beyond the appeal procedures. In addition to the shortcomings in the appeal itself, the Secretary breached his fiduciary duties in ultimately approving the lease with full knowledge that the negotiations of that lease had been skewed in Peabody's favor by the Secretary's own actions. The Government's effort to focus on the earlier appeal process cannot alter the fact that the Secretary's approval of the renegotiated lease under these circumstances constituted a clear breach of trust that is remediable by money damages.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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